Supreme Court, U.S.
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No. 97-601

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

Federal Election Commission,

Petitioner,

v.

Larry R. Williams,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals appropriately held that when it applied the statutory bar against legal relief contained in 28 U.S.C. § 2462, it also foreclosed equitable relief, especially in view of the fact that petitioner, the Federal Election Commission, admitted to the court that it could not present evidence of any ongoing or imminent violation of the law by appellant as to which injunctive relief might properly be ordered.

2. Whether the court of appeals properly held that the statute of limitations should not be tolled because materials from which a case against respondent could have been prepared were in the hands of the Federal Election Commission throughout the statutory limitations period and so respondent could not have engaged in fraudulent concealment.

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STATEMENT

Introduction

The respondent, Larry R. Williams, respectfully opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Petitioner's argument that the court of appeals' here-uncontested barring of the action at law under the statute of limitations described in 28 U.S.C. § 2462 should not be held to bar equitable relief against future violations of the law is a moot point given petitioner's concession before the court of appeals that it had no reason to conclude that respondent was about to violate the federal election law or would violate the law

in the future. The decision of the court of appeals is easily harmonized with governing authority of this Court and furnishes no appropriate basis for review here.

As to petitioner's argument that the statute of limitations should be tolled, there is no arguable split of authority in the circuits on the point and no important question of law presented here. Petitioner's interpretation of law, properly rejected by the court of appeals, would, contrary to statutory language, lead to the illogical result of turning any matter subject to the agency's investigatory powers into one of "fraudulent concealment." This would amount to the constructive cancellation of the statute of limitations, an entirely anomalous result.

Procedural History

In its December 26, 1996 decision, a panel of the United States Court of Appeals for the Ninth Circuit, following both its own precedent generally, and a series of cases in the D.C. Circuit specifically addressing the conduct of petitioner (also referred to herein as the Federal Election Commission or FEC), held that: 1) the five-year general federal default statute of limitations, 28 U.S.C. § 2462, applied to FEC actions for civil penalties under the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-55; 2) while 28 U.S.C. § 2462 is subject to equitable tolling, the FEC could not obtain the benefit of that doctrine in this case because information concerning the allegedly unlawful campaign contributions at issue was in the FEC's possession throughout the statute of limitations period; and 3) under the rule of *Cope v. Anderson*, 331 U.S. 461, 464, (1947), § 2462 precluded injunctive relief in this case because "the claim for injunctive relief is connected to the claim for legal relief." *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996).

Given the dissent of one of the appeals court panel members on the equitable tolling point ultimately raised here (but not on the statute of limitations or injunction points), the FEC petitioned the court for rehearing and suggested that the matter be reheard *en banc*. The FEC did not, however, seek rehearing of the fundamental holding of the panel that § 2462's statutory bar governs actions under the federal election laws. On June 5, 1997, the court of appeals denied rehearing.

Factual Background

The material facts are set forth in the opinion of the court of appeals at 104 F.3d at 239. According to the FEC, in late 1987, respondent purchased 40 Super Bowl tickets from the Philadelphia Eagles for $4,000. These were supposed to have been used in a promotion which would have made one ticket available to contributors who had given $1,000 to a particular presidential candidate's campaign committee. Respondent was alleged to have advanced the $1,000 price to 22 contributors who were friends of his, and then resold the tickets to recover his money. The contributions, thus, were attributed to him by the FEC, and their sum far exceeded what he lawfully could have donated to a given campaign.

After conciliation failed, the FEC brought suit in district court, which granted summary judgment to the FEC, assessing a $10,000 penalty and a 10-year injunction against respondent as to similar misconduct. The FEC had made no showing concerning either any continuation of alleged past misconduct by respondent or of any likelihood of anticipated future misconduct by him. The only factual allegations made concerned the alleged scheme regarding the football tickets. When the injunctive point was argued before the court of appeals, FEC counsel again was not able to make any such showing, though he was asked specifically if the agency had any such evidence.

Petitioner's argument concerning the unavailability of equitable relief under *Cope*, though it has a surface plausibility, fails in the end because it is no more than a straw man that bears no resemblance to the case at bar, where the equitable remedy sought was in fact coextensive with the legal remedy denied by virtue of the statute of limitations.

In cases where an enforcement agency such as the FEC can show continuing misconduct, or a substantial likelihood of present misconduct, it could, under its governing statute, obtain injunctive relief, notwithstanding the unavailability of fines or damages. In the instant case, however, the FEC made no showing of any likelihood of recurrence of misconduct, and sought no more than an automatic injunction. That sort of remedy is just what *Cope* precludes and the petition, therefore, should be denied.

Petitioner's argument concerning equitable tolling lacks even surface plausibility. Never having presented any evidence that respondent had ever engaged in any affirmative act of fraudulent concealment -- only that he had violated the law by making improper campaign contributions through an alleged scam involving Super Bowl football tickets -- the FEC's current argument would turn virtually any election-law case into a fraudulent concealment case, activating equitable tolling and effectively cancelling the statute of limitations. The court of appeal's decision to the contrary was eminently reasonable, and petitioner cannot describe a split of authority in the circuits or an important question of federal law in this regard.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS APPROPRIATELY HELD THAT, IN THIS CASE, THE STATUTORY BAR AGAINST LEGAL RELIEF, 28 U.S.C. § 2462 (THE APPLICABILITY OF WHICH IS NOT AT ISSUE HERE) ALSO FORECLOSED EQUITABLE RELIEF BECAUSE PETITIONER ADMITTED TO THE COURT THAT IT COULD PRESENT NO EVIDENCE OF ANY ONGOING OR IMMINENT VIOLATION OF THE LAW BY RESPONDENT AS TO WHICH INJUNCTIVE RELIEF PROPERLY MIGHT HAVE BEEN ORDERED.

Petitioner's argument concerning equitable relief would appear, on the face of things, to raise an important question. Upon close analysis, however, the argument should be seen to present no more than a hypothetical concern of no relevance to the instant case and raising no real threat to the government's authority to seek and to obtain injunctive relief, even in cases where remedies at law are otherwise unavailable.

In this case, the panel noted:

> FEC argues that § 2462 does not apply to actions for injunctive relief. This assertion runs directly contrary to the Supreme Court's holding in *Cope v. Anderson*. *Cope* holds that "equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy." In other words, because the claim for injunctive relief is

> connected to the claim for legal relief, the statute of limitations applies to both.

104 F.3d at 240.

On the facts presented, this ruling is not only correct, but it also does not jeopardize appropriate action on the part of regulatory agencies such as the FEC either. Indeed, it is noteworthy that in the nearly one year since the opinion in this case was published, the FEC cannot point to a single case in which this holding has been raised as a potential barrier to its (or any other enforcement agency's) obtaining injunctive relief independent of penalties at law. The reason for the unlikelihood of such an event is not obscure.

No matter how *Cope* is read, and petitioner accurately cites the fact that several circuits have interpreted the case differently, nothing in *Cope* pretermits the basic requirements for the award of injunctive relief, and the FEC admittedly cannot satisfy them.

Stated differently, the FEC constructively argues here that it should be entitled to injunctive relief merely because, in its view, the Ninth Circuit has applied *Cope* too broadly. At the same time the FEC has conceded that it cannot set forth any reason for a court to grant injunctive relief other than that respondent has committed a "violation" of the campaign contribution law which the FEC now concedes that it may not prove because it is barred by the statute of limitations.

Though challenged on the issue, the FEC offered no assertion that the respondent had continued to violate the law or that he was likely to violate the law -- grounds, as we shall show, that might support injunctive relief even absent legal relief. Thus, to the FEC, an injunction is somehow an automatic response to a mere finding that a party has violated

the law. This view makes legal and injunctive relief -- at least in this case -- part and parcel of the same thing and, logically and legally, subject to the rule of *Cope*, as the court of appeals properly held.

Petitioner's argument implies that equity was unconcerned with statutes of limitations. Such a suggestion would have been erroneous before law and equity were merged in the federal courts; it is even less tenable afterwards. Where there is no statute of limitations applicable to suits, equity fashions its own time limitations through the doctrine of laches. *International Tel. and Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 926 (9th Cir. 1975) *rejected on other grounds California v. American Stores Co.*, 495 U.S. 271, 283 (1990). Under this doctrine, prejudice to the defendant accrues as a rebuttable presumption by virtue of the bare fact of delay. *Id.* (citing *Russell v. Todd*, 309 U.S. 280 (1940)), the principal case upon which the Supreme Court relied in *Cope*.

Although analogous statutes of limitations do not automatically control the application of laches, equity generally will look to the statute of limitations relating to actions at law of like character and usually acts in conformity with it. *See International Tel.*, 518 F.2d at 926.

Petitioner's citations of text and case authorities predating the merger of law and equity are thus as inapplicable as they are unexceptionable. The hypothetical case that petitioner is worried about is very different from the case at bar, and the FEC's position in such a case should be unaffected by the denial of the petition here.

Under the standard for obtaining injunctive relief by which the FEC and many other enforcement agencies operate, an injunction may issue upon a showing that a person is likely to commit future violations of the pertinent federal laws. In turn, a demonstration of a likely future violation is predicated on proving that person's past violations of the law and, among other things, the likelihood of recurrent misconduct.

This standard was well established within the Ninth Circuit when it decided the case. *Compare SEC v. Fehn*, 97 F.3d 1276, 1295 (9th Cir. 1996) with *FEC v. Furgatch*, 869 F.2d 1256, 1262 (9th Cir. 1989). The *Furgatch* and the *Fehn* courts both relied upon *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980) as the case by which this standard is defined. The rule that no agency is automatically entitled to an injunction based upon a mere allegation of past misconduct is also definitively settled by this Court. *See Hecht v. Bowles*, 321 U.S. 321, 329 (1944); *see also Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975).

An enforcement agency may obtain an injunction in any federal district court to prevent violations or likely violations of the law upon a "proper showing." *See, e.g.*, 15 U.S.C. §§ 77t(b), 78u(d)(1); 2 U.S.C § 437g(a)(6)(B). A "proper showing" is made by demonstrating to the district court that there is a "reasonable expectation" that the defendant's past illegal activities will be repeated. *Fehn*, 97 F.3d at 1295-96. The enforcement agencies may prove a "reasonable expectation" by reference to "the totality of the circumstances surrounding the defendant and his [past] violations." *Id.* (citation omitted). The totality of the circumstances is assessed in light of, *inter alia*, the isolated

or recurrent nature of the defendant's prior infractions.[1/] *Id.* at 1295-96.

There is no *per se* rule requiring the issuance of an injunction upon the showing of a past violation, although past violations might give rise to an inference that there will be future violations. *Id.* at 1295. However, the elements predicating injunctive relief nonetheless must be satisfied.

The FEC made no attempt in this litigation to satisfy any of these criteria. Had it been able to do so, it is clear that its jurisdictional statute, the Supreme Court's holding in *Cope* and the court of appeals holding below could have allowed it to seek and obtain injunctive relief where past unlawful conduct is continuing or present unlawful conduct is likely, notwithstanding that it could not obtain penalties, fines or other remedies at law. *Compare Hecht v. Bowles, supra*. As for the instant case, these concerns are misplaced, and the Ninth Circuit's ruling should remain in force.

[1/]The other factors bearing on a finding that a defendant is likely to commit future violations of the law include: (i) the degree of scienter involved; (ii) a defendant's recognition of the wrongful nature of his conduct; (iii) the likelihood, because of a defendant's professional occupation, that future violations might occur; and (iv) the sincerity of his assurances against future violations. *Fehn*, 97 F.3d at 1295-96 (citing *Murphy*, 626 F.2d 633). *See also Furgatch*, 869 F.2d at 1263 n.5 (citing *Murphy*, 626 F.2d 633).

II. THE COURT OF APPEALS PROPERLY HELD THAT THE STATUTE OF LIMITATIONS, 28 U.S.C. § 2462, SHOULD NOT BE TOLLED BECAUSE MATERIALS FROM WHICH A CASE AGAINST RESPONDENT COULD HAVE BEEN PREPARED WERE IN THE HANDS OF PETITIONER, THE FEDERAL ELECTION COMMISSION THROUGHOUT THE STATUTORY LIMITATIONS PERIOD, AND PETITIONER COULD NOT MAKE OUT A CASE OF FRAUDULENT CONCEALMENT.

As noted, the court of appeals held that § 2462 was subject to equitable tolling. *Williams*, 104 F.3d at 240. However, it also held that the FEC had failed to satisfy any of the requisite elements for tolling to apply in this case. *Id.* at 241 (citing *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1154 (10th Cir. 1981)).[2/] In particular, the court held that the filing of campaign

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[2/]The FEC poses the question presented in a way that could distort the holding and effect of the court of appeal's decision. According to the FEC (Petition at I), the issue is "whether, when a defendant fraudulent conceals willful violations . . . the [FEC] is deemed, as a matter of law, to have notice sufficient to commence the running of the statute of limitations from routine reports filed with it that do not disclose the violations." The court of appeals, however, never held that respondent had fraudulently concealed anything. To the contrary, it held specifically that the FEC had failed to prove any of the requisite elements for tolling including fraudulent concealment. What the FEC is really saying is that any violation automatically involves fraudulent concealment. If that were the case, the distinction in the law that allows tolling would be rendered a nullity.

finance reports gave the FEC "notice of facts that, if investigated, would indicate the elements of a cause of action." *Id.* (citation omitted.) Moreover, well within the statutory period, the FEC received a complaint particularly describing the allegedly-unlawful conduct at issue.

There is nothing about the FEC's presentation that suggests that its position meets the criteria for the granting of a petition for certiorari; there is no arguable split among the circuits on the subject and it raises a trivial, not important, question of federal law.[3/] In any event, the FEC's argument is unworthy of logical or legal acceptance because, taken to its natural conclusion, it stands the statute of limitations on its head. As it did before the court of appeals, the FEC again argues that it doesn't have the time or resources to investigate the factual basis behind every campaign report furnished to it. This, of course, begs the question of why the FEC did not act with greater timeliness over the many months it had the complaint, to bring a viable case within the statutory limitations period.

Even more to the point, if the Court were to accept this argument, any case in which the FEC did not exercise due diligence would be turned into a fraudulent concealment case tolling the statute of limitations, effectively negating it save for the improbable circumstance in which the filer of an FEC report containing otherwise complete information concerning donors and amounts also states that the report should be subject to immediate investigation. That is the

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[3]The FEC's argument, based upon a lack of investigative resources, would better be made to the Office of Management and Budget and the Congress.

logical upshot of the FEC's position, and it should be rejected out of hand.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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